111-313-358

TRA[illegible] OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1883.

No. 296.

SIMEON B. ARMOUR, PLAINTIFF IN ERROR,

vs.

CHARLES F. HAHN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF KANSAS.

FILED SEPTEMBER 19, 1881.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 296.

SIMEON B. ARMOUR, PLAINTIFF IN ERROR,

VS.

CHARLES F. HAHN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

INDEX.

	Original.	Print.
Caption	1	1
Petition	1	1
Answer	3	2
Testimony of—		
C. F. Hahn	4	3
Wm. F. Tann	11	8
T. C. Russell	14	10
W. P. Alcutt	16	11
T. C. Russell (recalled)	16	12
T. B. Lester	17	12
C. F. Hahn (recalled)	18	13
Demurrer	18	13
Petition amended	19	14
Demurrer overruled	19	14
Defendant's request for directions to jury	19	14
Instructions asked by defendant	19	14
Charge to jury	20	14
Exceptions of defendant	24	17
Motion for new trial	25	17
Order dismissing case as to certain defendants and making new parties	26	18
Trial	27	19
Verdict and judgment	28	19
Clerk's certificate	29	20
Case signed	29	20
Bond	31	21
Writ of error	33	22
Citation	34	23
Clerk's certificate	35	23

1 Circuit Court of the United States, District of Kansas.

CHARLES F. HAHN, PLAINTIFF,
vs.
JOHN PLANKINTON ET AL., DEFENDANTS.

Be it remembered that on this 13th day of June, A. D. 1881, at a term of the Circuit Court of the United States for the District of Kansas, begun and held at the city of Leavenworth, in said district, on the first Monday of June, A. D. 1881, this action came on for trial before the Hon. George W. McCrary, circuit judge, and a jury, duly empannelled and sworn, and upon the following pleadings, to wit:

STATE OF KANSAS,
COUNTY OF WYANDOTTE, } *ss.*

In the District Court, 10th Judicial District, State of Kansas, in and for the County of Wyandotte.

CHARLES F. HAHN, PLAINTIFF,
vs.
JOHN PLANKINTON, S. B. ARMOUR, PHILIP D. Armour, Herman O. Armour, John F. Armour, John Black, and M. Cudaly, partners doing business under the name and style of Plankinton & Armour, Defendants. } Petition.

The complaint of the above-named plaintiff respectfully shows:

That before and at the time of the committing of the wrong and grievances hereinafter mentioned, and at the city of Kansas, in the said county of Wyandotte, the said defendants were co-partners, under the firm-name of Plankinton & Armour, and as such copartners occupied and owned certain premises in said city,
2 known as the packing-house property of the said defendants.

That on or about the 14th day of March, 1879, the said plaintiff, then and for a long time prior thereto being in the employ of the said defendants as a carpenter on said premises, was at work, together with others, in the erection of what was known as an addition to the cattle-bed, the same being a building or structure connected with and on said premises.

That while so engaged and employed by the defendants, the plaintiff was, by order and direction of the defendants and their agents, directed to take a joist and place the same on the outer ends of what was known as lookouts, and that while arranging and adjusting said joist in accordance with the instructions of the said defendants and their agents, it became necessary for the plaintiff to step out and upon a projecting piece of timber, which projecting piece of timber was inserted in the wall of said addition, and projected out from said wall some two feet more or less; that immediately upon placing one foot upon said projecting timber, and while in the act of stooping over to arrange said joist, and without any notice, warning, or reason to believe that said piece of projecting timber was insecure or unsafe, and without any fault or neglect on his part, the said projecting timber gave way, precipitating the plaintiff from the top of the wall of said building a distance of thirty-four feet to the platform beneath.

That the defendants, well knowing the premises, and well knowing the danger of said projecting timber, did on said day negligently, carelessly, and wrongfully direct the plaintiff to go out and upon said projecting timber to arrange said joist, without advising him of the danger thereof, or in any manner intimating to the plaintiff that there was danger in so doing, although they at the time well knew that the same was unsafe and dangerous.

3 That by reason and through the gross negligence, inattention, and want of proper care on part of the defendants and their agents, in not having made the said projecting timber secure in and to the said wall, and in not notifying plaintiff of its dangerous character, the plaintiff then and there, by means of the fall as aforesaid, became and was greatly injured in his back and spine, and suffered great pain of body from thence until the present time, during all of which time the plaintiff has been hindered and prevented from performing manual labor as heretofore, and has been and is, by means of the premises, otherwise greatly injured, and will, as he is advised and verily believes, be incapacitated, by means of said injuries, during the term of his natural life, from pursuing his usual and necessary business affairs.

Wherefore the plaintiff claims judgment against the defendants in the sum of fifteen thousand dollars.

BYRON SHERRY,
Att'y for Plff.

Answer.

In the District Court, 10th Judicial District, in and for the County of Wyandotte, Kansas.

CHARLES F. HAHN, PLAINTIFF,
vs.
JOHN PLANKINTON, S. B. ARMOUR, PHILIP D. Armour, Herman O. Armour, John F. Armour, John Black, and M. Cudahy, partners doing business under the name and style of Plankinton & Armour, Defendants.

1. Said defendant, S. B. Armour, one of the defendants herein, for answer to the petition herein denies each and every allegation of said petition and prays judgment.

2. For second answer and defence to said petition, said S. B.
Armour says that plaintiff's injuries and damage resulted
4 and were caused solely by reasons of plaintiff's own negli-
gence and want of care; wherefore defendant prays judgment.

3. For third answer and defence to the petition herein, said S. B. Armour denies that the defendants named in said petition are, or ever have been, co-partners, and denies that said defendants as such co-partners, or otherwise, have ever occupied or owned any premises whatever; wherefore he prays judgment.

PRATT, BRUMBACK & FERRY,
Att'ys for deft. S. B. Armour.

THE STATE OF MISSOURI, } *ss:*
COUNTY OF JACKSON, }

S. B. Armour, above named, makes oath and says that the denials in the foregoing answer of the allegations in said petition of the existence of a partnership between the defendants named in said petition are true.

S. B. ARMOUR.

Subscribed and sworn to before me, a notary public, in and for Jackson County, Missouri, this 8th day of October, A. D. 1879. My notarial commission will expire March 15, 1882.

[SEAL.] JOHN A. ROSS,
Notary Public.

S. B. Armour was the only defendant summoned and he alone appeared to suit. And the plaintiff, to maintain the issue on his part, offered evidence as follows:

Deposition of C. F. Hahn.

Charles F. Hahn, plaintiff, sworn.

Direct examination by Mr. Sherry.

Q. What is your full name? A. Charles Frederick Hahn.

Q. Where do you reside? A. In Kansas City, county of Wyandotte, State of Kansas.

Q. Are you the plaintiff in this action? A. Yes, sir.

Q. State what you were doing in March, 1879. A. I was working for Plankinton & Armour in their packing-house, on a place
called the cattle-bed.
5 Q. Where was their place? A. In Kansas City, Kansas.
Q. Now state what you were doing on the 14th of March,
1879?

A. I was working on the top of the roof—putting sheeting boards on one end of it, till along in the evening, then I got through there and went to the other end; when I got to the other end the foreman was there, and he told me and another man to take a joist and put it out on a projecting timber in the proper place.

Q. Right there state what your trade is? A. Carpenter.

Q. How were you working there, by the contract or by the day? A. By the day.

Q. Now go on and state what occurred while working in that capacity?

A. Here is a model of the building. (Here model of the building at the time of the injury exhibited to the jury, showing the defect complained of and referred to by the witness.) I was working on this part of the roof, and when I got through there I walked up to where the foreman was at the other end. The building was being put up like this, and there was joists going from this lookout to this one, and the lookouts were timbers set in the wall and projecting over the wall; this was the joist he ordered me and the other man to put on; we took the joist, one at each end, and walked out and laid it down here. There were two courses of brick built over the stick of timber on the wall. We sot the stick of timber down here to cut it off, and the foreman said "Shove her out, shove her out; she has to go clear out to the end." So the other man on this end shoved his out, and I shoved mine out. When I shoved the joist out it came sixteen inches outside the wall, and I put one foot on the stick of timber here inside the wall, and one on the outside
of the wall, and then sot down on my feet, kind of this way,
6 (illustrating) in order to reach over and place the joist with-
out falling, and when I sot down that stick tipped over, and caused me to fall to the platform thirty-four feet high.

Q. Were these other sticks all fastened? A. Yes, sir; I know, I helped to put them in, and they were spiked in, and this was put in, and I did not know anything about it. There were two courses of brick on the outside of this stick of timber and two inside, and as soon as I placed my foot on the outside portion of the timber it tipped and I went down.

Q. State, if you know, who placed that stick of timber?

A. I don't know.

Q. How did it appear to you at the time? A. Well it appeared to be secure, or else they would not be ordered out to do work on it.

Q. How long was this timber. A. 12 or 16 feet.

Q. One man took hold of each end. A. Yes, sir.

Q. Under the direction of whom? A. The foreman.

Q. What was his name? A. Fitzgerald.

Q. How far was he from you when he ordered you to go out and place this? A. 8 or 10 feet further in; there was a space for the bricklayers to build up the wall; they were working at the same time at the wall.

Q. How many men did Mr. Fitzgerald have charge of? A. I don't know exacty; twelve or foutreen, more or less; I don't know.

Q. He was your foreman? A. Yes, sir.

Q. It was your duty to obey his orders? A. Yes, sir.

Q. Who was doing his work on the building; I want to know if it was under any contract? A. No, sir; we were all working by the day's work, as much as I know.

Q. You received your pay from the office? A. Yes, sir; I was employed by Mr. Alcutt, the superintendent of the packing-house.

Q. Now, Mr. Hahar, you may state what the nature of your
7 injuries was? A. I fell on a solid two-inch platform, and fell
square on my rump; I did not know anything until some time after, when they carried me off, and when I came to my reason they hurt me, and I hollered, and they straightened me up so as not to hurt me.

Q. State how long it was after the fall till you came to your senses? A. Well, they picked me up and carried me into the house, and I don't know how long they had me lying there, and then they took me home, and after they had carried me a little distance the pain was so severe that I called out, and they straightened me up and carried me in a better position.

Q. Where did they carry you first? A. Into the superintendent's office.

Q. How long did you remain there? A. Probably half an hour; I don't know. They placed some gunny-sacks on the floor and laid me there, but I could not lay there, so I raised myself up in a sitting position, and a man put his arms around my neck to hold me up; after that they took me on a bed to my home.

Q. How far was it to your home? A. About three or four hundred yards.

Q. How long were you confined, and what became of you after this? A. Well, I was laid in bed for two or three weeks, that I did not get out at all; after that I got out on crutches, but I don't think I got out of the house for four or five weeks.

Q. How long did you use crutches? A. Up until the latter part of May, I think.

Q. Now state to the jury as nearly as you can, what pain you endured during that time, in consequence of this injury? A. The
pain was in my back, and in my bowels, and through my
8 limbs. After I was taken to the office and laid down, my
feet and legs were numb and dumb; and I asked some one to untie my shoe, for I thought that would relieve me, but it did not, and I have not been relieved to this day. After I got so I could go on crutches, I had it in my back, and have it now. I have been taking medicine from that time to move my bowels, and have to yet.

Q. How did it affect your urinary powers? A. It was about two days before I could make any water, and then it was drawn from me.

Q. How are you in that regard now? A. Well, I can make water, but it is not right; it comes slow by drops, and stops suddenly, and then starts again; it takes twice as long as before.

Q. State to the jury the condition of your back at the present time? A. I have a pain at the end of my back-bone that never leaves me day or night. I cannot walk of any account; if I go a half mile I get a cramp in my limbs and break down. I cannot work. What little I have to have done about the house, I have to have done by a hired man. When I do a half day's work it takes me three days.

Q. What are you doing for a living? A. I am keeping a boarding-house, and my wife and daughter have to do that.

[Objected to.]

Q. You may state whether you are able to perform any labor?

A. No, sir, I am not—not to give any satisfaction.

Q. What was your condition physically prior to the injury?

A. How is that?

Q. Before you were hurt. A. I was always a healthy man, and have never been sick since I was 21 years of age, only for a day or two, probably when I had a little cold.

Q. What is your age now? A. 46.

Cross-examination by Mr. Pratt.

9 Q. You are 46 years of age? A. Yes, sir.

Q. How long have you been working as a carpenter? A. I worked in 1875; I went to work on the Missouri Pacific, and worked about 18 months.

Q. How long have you been working as a carpenter? A. Four years.

Q. Were you a first-class carpenter? A. I don't know.

Q. Did you hire yourself out as a first-class carpenter? A. I hired out as a carpenter.

Q. This part of this model represents the roof of that building? A. Yes, sir.

Q. And this the brick wall? A. Yes, sir.

Q. How thick was that? A. 13 inches.

Q. These out-riggers were set into the wall? A. Yes, sir.

Q. Did you help put them in? A. No, sir; some of them I did, but they were spiked into the girder. That was the old wall of the building; I don't know how this was.

Q. You put in some and spiked them to the girders? A. Yes, sir.

Q. There was a place left by the masons in the brick wall to let this in? A. No; it was in before.

Q. Well, it was bricked up on each side? A. Yes, sir.

Q. But had no brick over it? A. No, sir.

Q. How much did it project over the wall? A. Well, sir, I don't know that it projected any.

Q. What was it Fitzgerald said to you about shoving that out? A. When we got this piece laid down, and got it plumb, he said, "Shove it out, shove it out; you have to put it clear out."

Q. How far was it from the wall to the outside of this piece of timber? A. 16 inches.

Q. And what was the width of the rafter? A. Two inches and a half.

Q. Then it would be about fourteen inches from the inside of the wall to the point you had to reach with the rafter? A. Yes, sir.

10 Q. Well, what did you do then? A. Then I shoved it out and sat down on my feet, and when I done that it broke down before I knew it.

Q. What broke down? A. This stick broke out of the wall—tipped up.

Q. You put your foot out there? A. Yes, sir.

Q. And you had one foot here, inside? A. Yes, sir.

Q. Well, if that had been fastened like this there would have been no danger? A. No, sir.

Q. You could have stepped out without danger then? A. Yes, sir.

Q. Why didn't you step out then; why did you step out one foot only if you supposed it had been fastened? A. Well, I could reach it better.

Q. Couldn't you reach out there without putting either foot out? A. No, sir.

Q. Couldn't you have kept your feet here inside and not put them out at all, and pushed that rafter out 14 inches? A. Yes, sir; but I could not look out and see whether it was in the proper place.

Q. But if this had been fastened as these were you could have stepped out? A. Yes, sir.

Q. With perfect safety? A. Yes, sir.

Q. Still you would have hesitated about stepping both feet out on this one? A. Yes, sir.

Q. Why? A. I do not understand you.

Q. You say you would have hesitated about putting both feet out? A. I would have done it if I had to.

Q. You looked no further to see whether it was fastened or not? A. Well, I saw it was put into the wall, but could not see whether it was fastened.

Q. But you could see whether it was spiked? A. Yes, sir; you could not spike it there.

Q. You knew it was not spiked? A. Yes, sir.

Q. Then how could it have been fastened except by bricking it over as the other was? A. Well, he could have spiked a piece on this way and built this over.

11 Q. Was that the way this other one was? A. No, sir; that was better.

Q. The fire wall was built up over it afterwards?

A. Yes, sir.

Q. That is what made it better? A. Yes, sir.

Q. Now, was not that the usual way of doing it; putting this timber in and leaving it that way temporarily, and afterwards building the wall up over it? A. Yes, sir.

Q. You say Mr. Fitzgerald told you to push that out?

A. Yes, sir.

Q. He did not tell you to go out? A. No, sir; he told me to push it out to the proper place.

Q. Who was the other man who was working with you?

A. He is dead.

Q. What was his name? A. Truar.

Re-examination by Mr. Sherry.

Q. Was this a clear space here? A. Yes, sir.

Q. And the distance down there was 34 feet? A. Yes, sir.

Q. How wide was this space here? A. Six inches.

Q. So you could not have very well stood with both feet on it?

A. No, sir.

Deposition of Wm. F. Tann.

Wm. F. Tann sworn.

Direct examination by Mr. Sherry.

Q. What is you name? A. William Frederick Tann.

Q. Where do you live? A. Armstrong, Kansas.

Q. What is your business? A. Carpenter and joiner.

Q. Do you know the plaintiff? A. I do.

Q. Where were you working the 14th of March, 1879.

A. I was working on James street, in Kansas City, Kansas, and
had occasion to use some tools which were in my chest at Plankin-
ton & Armours, 300 yards from there, probably. I went there to
get the tool, and one of the men was using it on the roof; I
went up on the roof just as this work was being done, and
12 as I was talking to one of the men now present, the order
was given to put this joist up, and in less than a minute
after the man fell.

Q. Who gave the order? A. Fitzgerald, the foreman.

Q. State to the jury whether this model represents the situation of that wall? A. Yes, sir.

Q. Now, just state what occurred? A. There was a joist that the two men were handling, and Mr. Hahn came out on this corner and pushed this out as he was told to do, and during the pushing of this out, after he was ordered a second time, he fell.

Q. How did he fall? What became of his timber? A. That went down.

Q. It was green brickwork? A. Yes sir.

Q. How long had this wall been built? A. Not many minutes.

Q. State how it might have been secured? A. It might have been secured by letting that come the proper distance in here.

Q. If it had extended back to here it would have been perfectly secure? A. Yes, sir.

Q. But this was sitting in a green wall? A. Yes, sir.

Q. Is there any other way in which it might have been secured? A. Yes, sir; by anchoring it.

Q. And building brick-work on that? A. Yes, sir.

Q. What is the customary way of fixing such things?

A. By anchoring them in the wall.

Q. You say you heard the order given to the men to shove this out, and saw the plaintiff here fall? A. Yes, sir.

Q. Did you assist in taking him away? A. No, sir.

Q. Did you see him picked up? A. I went down as quick as I could, and in the excitement I forgot what tool I came for, and I went into the office and stood there like many others, and Mr. Alcutt came in and asked Mr. Fitzgerald—

[Objected to as incompetent.]

13 Q. That was after the accident? A. Yes, sir.

Q. Have you had any conversation with any of the defendants in relation to this matter? A. No, sir.

Q. Did you have any conversation with the superintendent or the foreman in the presence of any of the defendants? A. No, sir; none whatever.

Q. I will ask if you had a conversation with the superintendent at the time of the accident as to how it happened? A. No, sir.

Cross-examination by Mr. Pratt.

Q. You are an old carpenter and joiner, are you? A. Yes, sir.

Q. Where were you standing at the time of this accident? A. About on that portion of the building.

Q. You heard this order given him to shove that piece out? A. Yes, sir.

Q. You were not where you could see the rafter and the outrigger as well as the man? A. Yes, sir.

Q. Well, did you notice that it was not put as far back as it should have been? A. I could not tell.

Q. There was no brick on it? No, sir.

Q. And you did not notice to see whether it extended back far enough or not? A. No, sir.

Q. You say it might have been fastened to the joists back here? A. Yes, sir.

Q. There were several fixed that way over further? A. Yes, sir.

Q. Those had been completed? A. Yes, sir.

Q. And you could see that this was not? A. Yes, sir.

Q. Was there any necessity for him stepping out there? A. I don't know.

Q. Have you done the same kind of work? A. Yes, sir; but I could not do that and look over to see it. The height of the building takes the sight away.

14 Q. Well, could you stand inside and reach out there? A. Yes, sir; but I could not do it accurately.

Q. If he had done that he would have been safe?

A. Well, this wall was green.

Q. Well, his weight would have been on this side and that would not have tipped over? A. It was the plank that tipped over. Q. What was its weight? A. A hundred pounds.

Q. What was its length? A. 16 to 18 feet.

Q. Well, there would be two other joists securely fastened here for that to rest upon? A. Well, it might be safe; I don't know.

Q. Well, if the plank was 16 feet long it would rest over there? A. Yes, sir.

Q. Now, this joist rested on the out-rigger? A. Yes, sir.

Q. Then only a portion rested on that? A. Yes, sir; the heaviest portion.

Q. Why? A. Because it came over this way projecting.

Q. How far? A. I don't know; it would be sawed off after putting it on.

Q. How long had you been on the roof? A. About ten minutes.

Q. How long do you say the wall had been finished?

A. About two minutes; the masons were just getting away when I got on the roof.

Q. Did you see the masons taking their tools away?

A. Yes, sir; and the line was up. The man broke the line when he fell.

T. C. Russell sworn.

Direct examination by Mr. Sherry.

Q. Where do you live? A. Kansas City, Kansas.

Q. What is your business? A. Carpenter.

Q. How long have you been working at that business?

A. Nearly ten years.

15 Q. Where were you employed in March, 1879? A. I was working on the new addition to Plankinton & Armour's packing-house.

Q. Do you know the plaintiff? A. I do.

Q. State what you saw with relation to the accident referred to here? A. Well, we were at work putting up what we called cornice. Myself and another man were working at it, and Mr. Hahn and Mr. Truar were sent there to help; at least they began at the other end of the cornice.

Q. State whether this is a representation of it? A. Yes, sir. Here on this part of the building, as *shone* on this model, is where Mr. Hahn was working, putting up joists 2 by 8 to form the projection. I was working right here when the fall occurred. The bricklayers were just through with this wall, and this cross-wall they were through with too. They had their line stretched across here, and while we were working there this line broke, and I looked up and saw Mr. Hahn fall. I did not know what he was doing at the time.

Q. Who had charge of the work on the roof there? A. Mr. Fitzgerald.

Q. Did you hear any orders given; if so, state what? A. I did not; it is quite a little distance from the roof to where I was working.

Q. What is the size of the building about? A. I don't know exactly; it must be 35 or 40 feet in width there.

Q. Do you know how many men this foreman had charge of there?

A. 13 or 14.

Q. Did you notice where Mr. Hahn started from? A. No, sir.

Cross-examination by Mr. Pratt.

Q. You are a carpenter and joiner? A. Yes, sir.

Q. You say there were 13 or 14 carpenters working there, and that Fitzgerald had charge of them? A. Yes, sir.

Q. He was not foremen over the other men? A. No, sir.

Q. There were masons and labors working there? A. Yes, sir.

16 Q. These joist ran from the center down here? A. Yes, sir.

Q. And it was 8 or 9 feet from one out-rigger to the other?

A. Yes, sir.

Wm. P. Alcutt sworn.

Direct examination by Mr. Sherry.

Q. Mr. Alcutt, what is your business? A. Beef and pork packing.

Q. Are you acquainted with the parties to this suit? A. I think most of them.

Q. Do you know the firm of Plankinton & Armour?

A. Plankinton & Armour or Plankinton & Armours?

Q. Plankinton & Armours. A. Yes, sir.

Q. Who composed that firm in 1879?

A. Philip D. Armour, John Plankinton, Herman O. Armour, Joseph F. Armour, William Plankinton, S. B. Armour, and William P. Alcutt.

Q. Now I will ask you if the firm you have mentioned were the men who were constructing that building at the time of this accident? A. They were.

Q. S. B. Armour was a member of that firm? A. Yes, sir.

Q. By Mr. Pratt. That firm was Plankinton & Armours? A. Yes, sir.

Mr. Sherry: We will ask leave to amend the petition to conform to the facts in that regard.

The Court: You may amend.

T. C. Russell recalled for cross-examination.

Q. By Mr. Pratt. Mr. Russell, I believe you said you had been a carpenter nearly ten years? A. Yes, sir.

Q. You heard the testimony of Mr. Hahn in regard to his stepping out on this timber and its tipping up with him? A. Yes, sir.

Q. I will ask you if there was any necessity for his stepping out there in order to do the work he undertook to do?

Plaintiff's counsel objected to the question as incompetent.

The court overruled the objection.

17 A. Well, for my part, I would not venture out on such a place myself to put the joist on.

Q. Well, could he have done it without stepping out there?

A. I think he could.

Re-examination by Mr. Fenlon.

Q. This is simply your opinion from hearing the testimony?

A. That is my opinion.

Q. What you would have done had you been there you are not prepared to say. A. No, sir; of course that is a different question.

Thos. B. Lester sworn.

Direct examination by Mr. Sherry.

Q. Please give your full name? A. Thomas P. Lester.

Q. What is your business? A. Physician and surgeon.

Q. How long have you been engaged in practice? A. A little upwards of thirty years.

Q. Where dou reside? A. Kansas City, Missouri.

Q. Do you know the plaintiff, Mr. Hahn? A. I do.

Q. State if you have treated him since the 14th of March, 1879, and what for? A. I was first called to prescribe for him two years ago for the effects, as stated to me, of a fall. I found he was suffering from want of power in the lower limbs, complaining of pain and a sense of numbness and with deficient power in the lower bowel and in the bladder.

Q. In your opinion, doctor, what caused these injuries? A. I supposed from the history of the case—as to the facts of the case I knew nothing—I supposed from the history of the case he had received a fall wherein he fell on the buttox, which produced concussion of the spine, an injury which would have produced all the symptoms of the patient described, such as numbness and want of power in the bowels and bladder. This was about four months from the time he said he had received the injury.

Q. Have you prescribed for him since then? A. Yes, sir; frequently.

18 Q. What is his present condition? A. Well, it is about the same; perhaps a little worse, so far as want of action in the bowels is concerned. He has had to take increased doses of cathartic medicines to move the bowels, and still complains of want of power in the bladder and numbness of the lower extremities.

Q. State whether his injuries are permanent or not? A. I am of opinion, from what I have seen of the case, that they are, and that he will never recover. It is possible that he may not recover from the injury to the bladder and spine, and the danger lies in that.

Q. Did you know him before the injury was received? A. I met him, and he seemed to be a stout man.

Cross-examination waived.

Chas. F. Hahn, plaintiff, recalled.

Direct examination by Mr. Fenlon.

Q. What part of this building did you go from when ordered to do this work? A. From the back part here. I was working in the afternoon, finishing the roof.

Q. Did you know the condition of this thing at the time. A. No, sir.

Q. Did you see the men working at it? A. No; I didn't know anything of it.

Cross-examination waived.

And this was all the evidence offered on the part of the plaintiff.

Defendant's counsel then offered a demurrer to the evidence as follows:

Demurrer.

United States Circuit Court, District of Kansas.

Charles F. Hahn, Plaintiff,
vs.
John Plankington et al., Defendants.

And now, at the close of the plaintiff's evidence, comes the defendant, S. B. Armour, and files a demurrer thereto, upon the ground that no cause of action is proven.

Said demurrer was argued and submitted to the court, and
19 thereupon, at the suggestion and by leave of court, the plaintiff amended his petition as follows: The names of John F. Armour, John Black, and M. Cudahy were stricken out as parties defendants, and the said action as to these three last-named defendants dismissed, and the names of William Plankinton, Joseph F. Armour, and William P. Alcutt were substituted and made parties

defendants. And thereupon the court overruled defendant's demurrer to the evidence, to which ruling defendant, by his counsel, then and there duly excepted.

The defendant introduced no evidence, and the foregoing contains all the evidence introduced upon the trial.

The defendant then asked the court to direct the jury to find upon particular questions of fact then and there stated in writing by the defendants, as follows, viz:

I. Did the defendants use ordinary care in and about the erection of the building, and in selecting materials and appliances therefor; if not, in what did such negligence consist?

II. Was the injury occasioned by reason of the order of Fitzgerald to plaintiff, and was such order a negligent or improper one?

III. Was the plaintiff guilty of any negligence which contributed to produce the injury?

IV. Could the defendant, by the exercise of ordinary care, have avoided the injury?

But the court refused to so direct the jury; to which refusal defendant, by his counsel, then and there excepted.

The defendant, by his counsel, then asked the court to give the following special instructions to the jury, to wit:

1. If the jury find from the evidence that the defendants exercised ordinary care in the erection of the building, and in selecting and furnishing suitable materials or appliances therefor, the defendants are not liable for the injury to plaintiff, and your verdict must be for the defendants.

20 2. By ordinary care is meant that care which an ordinarily prudent man would have exercised under the same circumstances.

3. If the jury find from the evidence that the injury was occasioned by reason of the order or direction given by Fitzgerald to plaintiff, you are instructed that the defendants are not liable to plaintiff for such act of Fitzgerald's, and your verdict must be for defendants.

4. If the jury find from the evidence that the plaintiff was guilty of negligence which contributed to produce the injury, he cannot recover, and your verdict must be for defendants.

5. If the jury find from the evidence that the plaintiff could, by the exercise of ordinary care, have avoided the injury, he cannot recover, and your verdict must be for defendants.

The court gave said instructions numbered 1, 2, 4, and 5, but refused to give said instruction numbered 3, to which refusal defendant, by his counsel, then and there duly excepted.

The court also instructed the jury as follows:

Gentlemen of the Jury: This is an action in which the plaintiff seeks to recover damages from the defendants on the ground of negligence. He alleges that he was employed by the firm sued here to do certain work as a mechanic in the erection or improvement of certain buildings in Kansas City, in this state, and that he received injuries while engaged in that employment which resulted from the negligence of the defendants in not providing a safe and suitable place in which to perform his duties, and under circumstances which have been detailed to you by the testimony.

Counsel have submitted to me certain instructions, some of which I will give you, and I have also prepared myself certain propositions which I will read to you.

21 1st. The evidence shows that the relation of master and servant existed between the plaintiff and defendants at the time of the accident and injury complained of.

2nd. It was the duty of defendants to take ordinary and reasonable care not to subject plaintiff to unreasonable or extraordinary danger by setting him to work on dangerous premises, and if they have failed in this duty and the plaintiff has, in consequence of such failure, been injured, without fault on his part, and without voluntarily assuming the risk, and without knowledge or probable means of knowledge of the danger, he may recover.

3rd. In considering the question whether plaintiff was at fault or guilty of contributory negligence, you will bear in mind that in entering upon the employment in which he was engaged at the time of the accident he assumed all the ordinary and usual risks incident to the employment, and was bound to use ordinary care and caution to avoid injury in the performance of his duty. What would be ordinary care and prudence on the part of a person so employed depends upon the circumstances by which he is surrounded and the extent of the danger incident to the occupation. The greater the danger the greater the care required. For example, if a man is driving his horse and carriage along a public road he is not required by law to exercise in the performance of that duty the same degree of care that he would be required to exercise if he was crossing a railway track. The degree of diligence which the law requires is proportionate to the extent of the danger by which he is surrounded. A man who is employed to work on the top of a high building, a place of more or less danger, is, of course, required to exercise in the performance of that duty more care than he would be required to exercise if employed on the surface of the earth, where there is no apparent danger. 22

4th. Plaintiff was not, however, bound to anticipate and provide against defects in the building upon which he was working, which an ordinarily prudent and cautious man would not have discovered in time to prevent the accident.

5th. If the plaintiff carelessly and unnecessarily stepped upon a projecting timber and this caused the injury he cannot recover, and it is for you to say upon the evidence whether, in obeying the order given him, and performing the duty required of him, he exercised ordinary care, that is, such care as an ordinarily prudent man would have exercised under the circumstances.

6th. If the defendants employed a person to superintend the work on the building in question, who had the control and direction of plaintiff, then the acts and orders of said foreman, in connection with the construction of said building, are to be considered as the acts and orders of the defendants.

7th. It is not necessary for the plaintiff to show that the defendants, or their foreman in charge of the work, knew of the existence of the defects which caused the accident, but it is necessary he should show either that they knew of such defect or were in duty bound to know of it. And in this connection I charge you that it was the duty of the defendants and their foreman to be advised so far as was practicable by the use of due diligence, as to the condition with respect to strength and safety of any timbers which the plaintiff might, in the performance of his duty, be expected to step or stand upon. Ignorance upon the part of the employer is negligence in a case in which proper inquiry would have obtained the necessary information, and where such employer was bound to make such inquiry.

23 8th. In the light of these instructions you will inquire and decide from the evidence, first, whether the defendants were guilty of negligence in failing to provide a reasonably safe place upon which plaintiff could perform the duties required of him. If this question is answered by you in the negative your verdict must be for the defendants; but if you find affirmatively you will proceed to inquire, secondly, whether the plaintiff, by his own failure to exercise ordinary care, contributed to his injury. If you find he did he cannot recover. But if you find negligence on the part of the defendants and no contributory negligence on the part of plaintiff, then your verdict must be for plaintiff.

9th. If you find for the plaintiff, you will, in estimating the damages, take into consideration the nature and extent of his injuries, whether the same are temporary or permanent, also the pain and loss of time, as well as his probable future condition and suffering consequent upon the injury, so far as the same are shown by the evidence.

Upon the whole case you will fix such compensatory damages as in your judgment shall be reasonable and just, and not unreasonable or excessive.

The plaintiff has submitted certain propositions, but I think they are covered by what I have given.

On the part of the defendant, I am asked to say to you:

1st. If the jury find from the evidence that the defendants exercised ordinary care in the erection of the building, and in selecting and furnishing suitable materials or appliances therefor, the defendants are not liable for the injury to plaintiff, and your verdict must be for defendants.

2nd. By ordinary care is meant that care which an ordinarily prudent man would have exercised under the same circumstances.

4th. If the jury find from the evidence that the plaintiff 24 was guilty of negligence which contributed to produce the injury, he cannot recover, and your verdict must be for defendants.

5th. If the jury find from the evidence that the plaintiff could, by the exercise of ordinary care, have avoided the injury, he cannot recover, and your verdict must be for defendants.

I have given all these except the 3d.

To that portion of said instructions or charge to the jury, as follows, to wit: "6th. If the defendants employed a person to superintend the work on the building in question, who had the control and direction of plaintiff, then the act and orders of said foreman, in connection with the construction of said building, are to be considered as the acts and orders of the defendants," defendant, by his counsel, then and there duly excepted.

And to that portion of said instructions or charge to the jury, as follows, to wit: "7th. It is not necessary for plaintiff to show that the defendants, or their foreman in charge of the work, knew of the existence of the defects which caused the accident, but it is necessary he should show, either that they knew of such defect, or were in duty bound to know of it. And in this connection I charge you that it was the duty of the defendants and their foreman to be advised, so far as was practicable by the use of due diligence, as to the condition with respect to strength and safety of any timbers which the plaintiff might, in the performance of his duty, be expected to step or stand upon. Ignorance upon the part of the employer is negligence, in a case in which proper inquiry would have obtained the necessary information, and where such employer was bound to make such inquiry," defendant, by his counsel, then and there duly excepted.

The jury thereupon retired, and after deliberation re- 25 turned a verdict in favor of plaintiff and against defendant for the sum of seventy-five hundred dollars. The defendant thereupon, and on same day, filed his motion for a new trial, in the words and figures following, to wit:

Motion for New Trial.

United States Circuit Court, District of Kansas.

CHARLES F. HAHN, PL'FF,
vs.
JOHN PLANKINTON ET AL., DEF'TS.

Now comes the defendant, S. B. Armour, in the above-entitled cause, and moves the court for new trial for the following causes:

1. The verdict is not sustained by sufficient evidence, and is contrary to law.

2. For errors of law occurring at the trial and excepted to by said defendant.

PRATT, BRUMBACK & FERREY,
Att'ys for Def't.

Said motion was submitted to the court, and by it on the same day overruled, to which ruling the defendant, by his counsel, then and there duly excepted, and thereupon judgment was entered upon said verdict in favor of said plaintiff and against said defendant, S. B. Armour, for the sum of seventy-five hundred dollars and costs of suit.

The following is a certified copy of the record of proceedings as furnished by the clerk:

26 UNITED STATES OF AMERICA, DISTRICT OF KANSAS, *ss.*

At a term of the Circuit Court of the United States of America for the District of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 6th day of June, 1881, proceedings were had and appear of record in words and figures following, to wit:

Case dismissed as to some and new parties made Def'ts.

MONDAY, *June 13th*, 1881.

CHARLES F. HAHN, PLAINTIFF,
2969. *vs.*
JOHN PLANKINTON, S. B. ARMOUR, PHILIP D. Armour, Herman O. Armour, John F. Armour, John Black, and M. Cudely, partners doing business under the name and style Plankinton & Armour, Defendants.

An now, on this day, this case is called for trial, plaintiff being represented by Messrs. Sherry & Fenlon, his attorneys, and the defendant, S. B. Armour, by his attorneys, Pratt, Brumback & Ferry, whereupon, by consent, the names of John F. Armour, John Black, and M. Cudaly were strickon out as parties defendants and the said action as to these three last-named defendants dismissed, and the names of William Plankinton, Joseph F. Armour, and William P. Alcott were submitted and made parties defendants herein; and thereupon said action proceeded to trial in the name of Charles F. Hahn, plaintiff, against Philip D. Armour, John Plankinton, Herman O. Armours, William Plankinton, Joseph F. Armours, S. B. Armour, William P. Alcott, partners doing business under 27 the name of Plankinton and Armours, defendants, and both parties announcing themselves ready for trial, the following jury was called, to wit: J. B. Parrott, Wm. Whitehead, Ed. R. Smith, J. C. Burnette, W. L. Barbour, Asa Kinney, J. C. Van

Allen, W. W. Sargent, M. Newton, Jacob G. Miller, C. W. Green, and Wm. H. Chase, who were duly sworn to try the issues joined in the case, and when the plaintiff rested said defendant, S. B. Armour, filed his demurrer to the evidence, which, on due consideration, was by the court overruled, to which ruling said defendant then and there excepted, and the trial was further proceeded with, and not being concluded at the time of adjournment the jurors are admonished by the court as to their duties herein and the further hearing postponed until to-morrow.

Trial by Jury.

UNITED STATES OF AMERICA, } *ss:*
DISTRICT OF KANSAS, }

At a term of the Circuit Court of the United States of America for the District of Kansas, begun and held at the City of Leavenworth, in said district, on Monday the 6th day of June, 1881, proceedings were had and appear of record, in words and figures following, to wit:

TUESDAY, *June* 14, 1881.

CHARLES F. HAHN, PLAINTIFF,
2969. *vs.*
JOHN PLANKINTON, S. B. ARMOUR, PHILIP D. ARMOUR, Herman O. Armour, Joseph F. Armour, S. B. Armour, Wm. P. Alcott, partners doing business under the name of Plankinton & Armour, Defendants.

28 Now comes the parties herein same as on yesterday, and the jurors empanneled herein being called and all being present, the trial of this cause is proceeded with; and the jury having heard the evidence and the arguments of counsel thereon, and having been instructed by the court in the law governing the case, retire to their room, under the charge of a sworn bailiff, to consider of their verdict; and, after due deliberation, return into court and present the verdict of the jury therein as follows, to wit: "Charles F. Hahn vs. John Plankinton et al. We, the jury in said entitled action, find for the plaintiff and assess his damages against the defendant at the sum of seven thousand and five hundred dollars. J. C. Burnett, foreman." And thereupon the jury were discharged from the further consideration of this case. And thereupon defendant filed his motion to set aside the verdict and for a new trial hereof, which motion is by the court on due consideration thereof overruled, to which ruling and decision of the court said defendant excepted. It is therefore by the court here considered, ordered, and adjudged that said plaintiff, Charles F. Hahn, have and recover of and from said defendant, S. B. Armour, personally, and

as a member of said firm of Plankinton & Armour, the sum of seven thousand and five hundred dollars, with interest thereon at the rate of seven (7) per cent. per annum from this time until paid, and all his costs herein expended; and that execution issue therefor, from and after sixty days from the 14th day of June, A. D. 1881. To the rendition of which judgment said defendant then and there excepted, and, for good and sufficient cause to the court shown, it is ordered that leave be and the same is hereby given said defendant to make his case herein for the Supreme Court, and 29 to serve the same on said plaintiff, or his attorney of record, within sixty days from this 14th day of June, A. D. 1881, and the time in which so to do is hereby so enlarged and extended.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF KANSAS, }

I, A. S. Thomas, clerk of the Circuit Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the record of the proceedidgs in the action of Charles F. Hahn *vs.* John Plankinton & S. B. Armour *et al.*, No. 2969, in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 11th day of July, A. D. 1881.

[SEAL.] A. S. THOMAS, *Clerk.*
By W. W. GELATT, *Deputy.*

Endorsed: No. 2969. Charles F. Hahn *vs.* Plankinton & S. B. Armour *et al.* Copy from the record of the proceedings.

Wherefore, the said defendant, S. B. Armour, makes this his case herein, time for so doing being extended by orders of said court, and same having been served on the attorney of record of plaintiff, Byron Sherry, more than three days before this, and the same is now, by George W. McCrary, the judge of said court trying the case, settled and signed, and he causes same to be attested by the clerk of said court, and the seal of said court is hereto attached, this 4th day of August, 1881.

GEORGE W. McCRARY,
Circuit Judge.

Attest:
[SEAL.] A. S. THOMAS, *Clerk.*

The foregoing case is correct.
Dated August 1, 1881.

BYRON SHERRY,
One of the Att'ys for Plff.

30 Endorsed: No. 2969. Charles F. Hahn *vs.* John Plank-

inton *et al.* Agreed case for U. S. S. C. Filed Aug. 6, 1881. A. S. Thomas, clerk.

31 *Appeal Bond.*

Supreme Court of the United States.

SIMEON D. ARMOUR, IMPLEADED WITH JOHN Plankinton, Philip D. Armour, Herman O. Armour, William Plankinton, Joseph F. Armour, and William P. Allcutt, Plff. in Error,

vs.

CHARLES F. HAHN, DEFT. IN ERROR.

Know all men by these presents that we, Simeon B. Armour as principal, and A. Watson Armour and Henry Coats as sureties, all of Kansas City, Missouri, are held and firmly bound unto Charles E. Hahn, of Kansas City, Wyandotte County, Kansas, in the sum of fifteen thousand dollars, to be paid to the said Charles F. Hahn, his executors or administrators. To which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 8th day of August, 1881. Whereas the above-named Simeon B. Armour hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Circuit Court of the United States for the District of Kansas:

Now, therefore, the condition of this obligation is such, that if the above-named Simeon B. Armour, shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

SIMEON B. ABMOUR. [SEAL.]
A. WATSON ARMOUR. [SEAL.]
KERSEY COATS. [SEAL.]

32 STATE OF MISSOURI,
JACKSON COUNTY, } *ss.*

A. Watson Armour and Kersey Coats, being severally duly sworn, say, and each for himself says, that he is a freeholder, and worth more than the sum of fifteen thousand dollars over and above all just debts and liabilities that he owes or has incurred, in property not exempt from levy and sale on execution.

A. WATSON ARMOUR.
KERSEY COATS.

Subscribed and sworn to before me, this 8th day of August, 1881.

[SEAL.] HENRY D. ASHLEY,
Notary Public,

The above bond is satisfactory.
August 8th, 1881. BYRON SHERRY,
One of the Att'ys for Plff.

The foregoing bond is hereby approved.
Dated August 9th, 1881.
C. G. FOSTER, *Judge.*

Endorsed: No. 2969. Supreme Court of the United States. Simeon B. Armour, impleaded, &c., vs. Charles F. Hahn. Bond. Filed August 11, 1881. A. S. Thomas, clerk.

33 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you, between Charles F. Hahn, plaintiff, and John Plankinton, Simeon B. Armour, Philip D. Armour, Herman O. Armour, William Plankinton, Joseph F. Armour, and William T. Allcutt, defendants, a manifest error hath happened, to the great damage of the said Simeon B. Armour, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held. That the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of Ameaica, this 8th day of August, A. D. 1881.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

(Endorsed:) No. 2969. Charles F. Hahn vs. John Plankinton et al. Writ of error. Filed Aug. 9, 1881. A. S. Thomas, clerk.

By W. W. Gelatt, deputy. I acknowledge service of copy of within this 8th day of August, 1881. Byron Sherry, one of the attorneys for plff.

34 UNITED STATES OF AMERICA, *ss.*

To Charles F. Hahn, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Kansas, wherein Simeon B. Armour, impleaded with John Plankinton, Philip D. Armour, Herman O. Armour, William Plankinton, Joseph F. Armour, and William P. Allcutt, is platntiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 9th day of August, in the year of our Lord one thousand eight hundred and eighty-one.

C. G. FOSTER, *Judge.*

STATE OF MISSOURI,
JACKSON COUNTY, } *ss.*

Morris E. Jones, being duly sworn, deposes and says that on the 26th day of August, 1881, at Kansas City, Missouri, he served the foregoing citation on Charles F. Hahn, the defendant in error therein named, by handing to and leaving with him a true copy thereof; and that he knows the person upon whom he made such service to be the same person therein described as defendant in error.

MORRIS E. JONES.

Subscribed and sworn to before me this 27th day of August, 1881.

[SEAL.]

HENRY D. ASHLEY,
Notary Public, Jackson Co., Mo.

35 UNITED STATES OF AMERICA,
DISTRICT OF KANSAS, } *ss.*

I, A. S. Thomas, clerk of the Circuit Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full and perfect copy of the record of "case made" in the action of Charles F. Hahn vs. John Plankinton et al., No. 2969, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said District of Kansas, this 15th day of August, A. D. 1881.

[SEAL.] A. S. THOMAS, *Clerk.*
By W. W. GELATT, *Deputy.*

(Endorsed on cover:) Kansas C. C. U. S. No. 296. Simeon B. Armour, plaintiff in error, vs. Charles F. Hahn. Filed September 19, 1881.

111-318

[illegible] U.S.
[illegible] 10 1891
[illegible]

UNITED STATES SUPREME COURT.

SIMEON B. ARMOUR,
PLAINTIFF IN ERROR,
vs. No. 296
CHARLES F. HAHN,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

WALLACE PRATT,
Attorney for Plaintiff in Error.

UNITED STATES SUPREME COURT.

SIMEON B. ARMOUR,
Plaintiff in Error,

vs. No. 296.

CHARLES F. HAHN,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

The defendant in error, Charles F. Hahn, brought suit in the Circuit court of the United States for the District of Kansas against the plaintiff in error, Simeon B. Armour, and others composing the firm of Plankinton & Armours, to recover damages for a personal injury sustained while in the employ of said firm as a carpenter, and engaged in the erection of a building for them in Kansas City. Simeon B.

Armour alone was served with process, and he alone appeared and defended the action.

The negligence of the defendants, which the plaintiff claimed to have caused the injury, is alleged in the petition in the following language:

"That on or about the 14th day of March, 1879, the said "plaintiff, then, and for a long time prior thereto, being in "the employ of the said defendants as a carpenter on said "premises, was at work together with others in the erection "of what was known as an addition to the cattle-bed, the same "being a building or structure connected with and on said "premises.

"That while so engaged and employed by the defend-"ants, the plaintiff was, by order and direction of the defend-"ants and their agents, directed to take a joist and place the "same on the outer ends of what was known as lookouts, "and that, while arranging and adjusting said joist in ac-"cordance with the instructions of said defendants and "their agents, it became necessary for the plaintiff to step "out and upon a projecting piece of timber, which project-"ing piece of timber was inserted in the wall of said ad-"dition, and projected out from said wall some two feet "more or less; that, immediately upon placing one foot "upon said projecting timber, and while in the act of "stooping over to arrange said joist, and without any "notice, warning or reason to believe that said piece of "projecting timber was insecure or unsafe, and without any "fault or neglect on his part, the said projecting timber "gave way, precipitating the plaintiff from the top of the "wall of said building a distance of thirty-four feet to the "platform beneath.

"That the defendants well knowing the premises, and "well knowing the danger of said projecting timber, did on "said day negligently, carelessly and wrongfully direct the "plaintiff to go out and upon said projecting timber to ar-

"range said joist, without advising him of the danger "thereof, or in any manner intimating to the plaintiff that "there was danger in so doing, although they at the time "well knew that the same was unsafe and dangerous.

"That by reason and through the gross negligence, "inattention and want of proper care, on part of the defendants and their agents, in not having made the said projecting timber secure in and to the said wall, and in not "notifying plaintiff of its dangerous character, the plaintiff "then and there, by means of the fall as aforesaid, became "and was greatly injured in his back and spine and suffered "great pain of body from thence until the present time, "during all of which time the plaintiff has been hindered "and prevented from performing manual labor as heretofore, and has been, and is, by means of the premises, "otherwise greatly injured, and will, as he is advised and "verily believes, be incapacitated, by means of said injuries "during the term of his natural life, from pursuing his "usual and necessary business affairs."

The defendant in his answer pleaded :

First—General denial.

Second—That plaintiff's injuries were caused solely by his own negligence and want of care.

To this answer no reply was filed.

The issues so joined came on for trial June 13th, 1881, before the Circuit Judge and a jury.

At the close of the plaintiff's case, the defendant in conformity with the practice of the Court filed a demurrer to the evidence, alleging as a ground therefor that no cause of action had been proven.

The Court overruled the demurrer, and to that ruling the defendant then and there excepted.

The defendant introduced no evidence, and the case was thereupon closed.

The defendant, in accordance with the Statutes of the

State of Kansas, and the practice of its Courts, asked the Court to direct the jury to find upon particular questions of fact then and there stated in writing by the defendant.

But the Court refused to so direct the jury, to which refusal the defendant then and there duly excepted.

The defendant then asked the Court to give five certain special instructions to the jury, the third one of which is as follows:

"Third—If the jury find from the evidence that the "injury was occasioned by reason of the order or directions "given by Fitzgerald to plaintiff, you are instructed that "the defendants are not liable to plaintiff for such act of "Fitzgerald, and your verdict must be for defendants."

This instruction the Court refused to give, and the defendant then and there duly excepted to such refusal.

The Court then instructed the jury in writing.

To that portion of the charge to the jury as follows, to wit:

"Sixth—If the defendants employed a person to superintend the work on the building in question, who had the "control and direction of plaintiff, then the acts and orders "of said foreman in connection with the construction of "said building are to be considered as the acts and orders "of the defendants"; defendant then and there duly excepted.

And to that portion of the charge to the jury as follows, to wit:

"Seventh—It is not necessary for the plaintiff to show that "the defendants, or their foreman in charge of the work knew "of the existence of the defects which caused the accident, "but it is necessary he should show either that they knew "of such defect, or were in duty bound to know of it. And "in this connection I charge you that it was the duty of "the defendants and their foreman to be advised so far as "was practicable by the use of due diligence, as to the "condition with respect to strength and safety of any tim-"bers which the plaintiff might, in the performance of his "duty, be expected to step or stand upon. Ignorance upon "the part of the employer is negligence in a case in which "proper inquiry would have obtained the necessary inform-"ation, and where such employer was bound to make such "inquiry;" the defendant then and there duly excepted.

Thereupon the case was submitted to the jury, who returned a verdict in favor of plaintiff and against the defendant for the sum of $7,500.00.

And the same day the defendant filed his motion for a new trial, which was by the Court overruled, and such ruling duly excepted to.

And thereupon judgment was entered upon said verdict in favor of plaintiff, and against the defendant S. B. Armour, for $7,500.00 and costs of suit.

To reverse this judgment the plaintiff in error has sued out the writ of error herein.

Assignment of Errors.

First—The overruling by the Circuit Court of the demurrer to evidence filed by the defendant at the close of plaintiff's testimony.

Second—The refusal of the Circuit Court to give to the jury the third special instruction asked by the defendant.

Third—The giving to the jury by the Circuit Court of that portion of its written charge contained in the sixth subdivision thereof.

Fourt—The giving to the jury by the Circuit Court of that portion of its written charge contained in the seventh subdivision thereof.

ARGUMENT.

I.

The demurrer to evidence filed by the defendant at the close of plaintiff's case should have been sustained.

The specific acts of negligence set out in the petition, though indefinitely and improperly pleaded, are substantially as follows, viz :

That the piece of timber which was inserted in the top of the wall of the building in process of erection, and which projected outward some two feet more or less from the building, was improperly secured.

That in obeying an order of the defendant *it became necessary* for the plaintiff to step out upon this projecting timber, and that immediately upon placing one foot upon it, and without any fault or negligence on his part, the projecting timber gave way and precipitated him from the top of the wall some thirty-four feet to the platform below.

Also that the defendant well-knowing the danger culpably and negligently *directed the plaintiff* to go out and upon the projecting timber without advising him of the danger, etc.

The petition and the testimony show that the firm of Plankinton & Armours, of which the defendant is a member, were the owners and in occupation of a large packing house property in the City of Kansas, and on March 14th, 1879, were erecting an additional building to this property; that the plaintiff at the time was, and for a long time prior had been, in the employ of said firm as a carpenter and engaged in and about the erection of this new building.

That Mr. Ailcutt was the *Superintendent* of the packing house and made the contract of employment with the plaintiff (page 5 of record); that Mr. Fitzgerald was the foreman of some thirteen or fourteen carpenters working upon the building, of which plaintiff was one; that there were masons and other men also at work there, but Fitzgerald was not their foreman (page 11 of printed record); that the plaintiff and a man by the name of Truar, who died before the time of the trial (page 8 of record), were set to work by Fitzgerald the foreman putting up what was called cornice (page 10 and pages 4, 6 and 7 of printed record); that this cornice was made by inserting in the brick wall, which was thirteen inches in thickness, at intervals of eight or nine feet, and at right angles to it, a piece of timber called "outriggers" or "lookouts," long enough to project outward from the wall about sixteen inches (pages 4, 6, 7 and 11 of printed record), and by placing on the outer ends of these outriggers or lookouts, at right angles to them and parallel to the wall, a joist some sixteen feet in length (pages 4, 7 and 10 of printed record); that the plaintiff and the man Truar were directed by the foreman to take a joist and put it out on the projecting timbers, or lookouts, in the proper place (page 3 of printed record); that thereupon they took the joist, one of them at each end, and laid it upon the projecting timbers; that the foreman told the plaintiff to shove the joist out to the end of the lookout; that the plaintiff, instead of standing inside or upon the brick wall, placed one foot upon the projecting timber inside of the wall, and the other upon that portion of the projecting timber *outside of the wall*, and thereupon this timber tipped over and caused the plaintiff to fall some thirty-four feet to the platform, and to receive the injuries complained of (pages 4, 7 and 8 of printed record).

First—*Was the plaintiff ordered or directed by the* *foreman to go out upon the projecting timber as alleged in the petition?*

The testimony of the plaintiff himself, both in his direct and cross-examination, shows conclusively that no such order or direction was given.

In his direct examination, on page 3 of the printed record, he says:

"I was working on the top of the roof putting sheeting "boards on one end of it, till along in the evening, "then I got through there and went to the other end; "when I got to the other end the foreman was there, and "he told me and another man to take a joist and put it out "on a projecting timber in the proper place."

And on page 4 he says:

"We sot the stick of timber down here to cut it off, and "the foreman said 'shove her out, shove her out, she has to "go clear out to the end'; so the other man on this end "shoved his out and I shoved mine out. When I shoved "the joist out it came sixteen inches outside of the wall, "and I put one foot on the stick of timber here inside the "wall and one on the outside of the wall, and then I sot "down on my feet kind of this way (illustrating), in order to "reach over and place the joist without falling, and when I "sot down that stick tipped over and caused me to fall to "the platform thirty-four feet high."

Again, in his cross-examination, on page 6 he says:

"When we got this piece laid down, and got it plumb, "he said, 'shove it out, shove it out; you have to put it clear "out.'"

Also, in further cross-examination on page 8 he says:

"Q.—You say Mr. Fitzgerald told you to push that out?"

"A.—Yes sir."

"Q.—He did not tell you to go out?"

"*A.—No sir. He told me to push it out to the proper place.*"

This is corroborated by the testimony of the witness Tann on page 8 of the printed record, and completely negatives the allegation of the petition, that plaintiff was ordered or directed to step outside of the wall upon the projecting timber, which fell and occasioned the injury.

Second—*Was it necessary for the plaintiff to step outside of the wall upon the projecting timber, as alleged in the petition?*

The plaintiff testified that the wall was thirteen inches thick; that the distance from the outside of the wall to the end of the projecting timber was about sixteen inches, and that the joist or rafter, which he and Truar were shoving out, was two and one-half inches wide (pages 4 and 7 of printed record). This would make the distance from the inside of the wall to the inside of the joist about twenty-six and one-half inches; certainly not a great or unusual distance for an ordinary man to reach. There could be no difficulty whatever for a man, standing within the wall of the building, to reach out and shove a joist into place upon the end of the projecting timber, twenty-six and one-half inches distant.

The witness, Tann, in his cross-examination, on pages 9 and 10, although making answer to the question whether there was any necessity for the plaintiff stepping outside the wall, that he did not know, yet admitted *that he, witness, could stand inside and reach out to the point in question*, but could not do it accurately. What degree of mathematical accuracy was required, in simply shoving a joist out to the end of a projecting timber, was not made apparent by the testimony.

The plaintiff's witness, Russell, in his cross-examination on page 12 of printed record, testified as follows :

"Q.—You heard the testimony of Mr. Hahn in regard to his stepping out on this timber ?"

"A.—Yes sir."

"Q.—I will ask you if there was any necessity for his stepping out there in order to do the work he undertook to do?

"*A.—Well, for my part, I would not venture out on such a place myself to put the joist on.*"

"*Q.—Well, could he have done it without stepping out there?*"

"*A.—I think he could.*"

This was the testimony of the plaintiff, and of his own witnesses, and it shows conclusively what must be apparent to any person of ordinary intelligence, that there was no necessity that plaintiff should step one foot outside of the wall upon the projecting timber, in order to shove the joist out to its proper place.

Third—*Was the projecting timber insecurely fastened in the wall?*

This depends upon the purpose for which the timber was inserted in the wall.

If it were the intention and expectation, that whoever might be engaged in placing the joists should be required to step outside of the wall, and upon this timber, then the timber was not securely fastened.

But there was no evidence whatever that the projecting timber was for any such purpose. It was not shown by the testimony, nor attempted to be shown, *that any person, other than the plaintiff, ever stepped out upon one of these projecting timbers, or that the plaintiff ever did so except at the time he was injured.*

If, however, the purpose of the projecting timber was simply to bear the weight of the joists, at least until the completion of the fire wall and roof, then the fact that the plaintiff placed the joist upon the timber, without causing it to tip over, and that it did so only after he stepped outside of the wall and placed one foot upon it (page 4 of printed record), shows conclusively that the timber was sufficiently secure for that purpose.

Fourth—But conceding that it was necessary, as alleged in the petition, for the plaintiff to step out upon the timber, and that it was insecurely fastened, the defendant would not be liable unless he knew of the defect, or by the exercise of proper care could have ascertained it, there being no pretense that the defendant himself, or any member of the firm of Plankinton & Armours, personally placed the timber in the wall.

The wall had just been completed by the masons, when plaintiff was directed to place the joist on the projecting timber (page 10 of printed record).

There is not the slightest testimony tending to show that the defendant, or any one representing him, knew of any defect; and that, by the exercise of proper care, such defect could have been ascertained is negatived by the testimony of plaintiff himself, on page 4 of printed record, as follows :

"Q,—State if you know who placed that stick of timber?

"A.—I don't know.

"Q.—How did it appear to you at the time ?

"A.—*Well, it appeared to be secure, or else they would " not be ordered out to do work on it.*"

If it appeared to be secure to the plaintiff, who was an experienced carpenter, he certainly has no ground to claim that there was any want of proper care on the part of the defendant, when the superintendent, or the foreman, equally with the plaintiff assumed that the timber was secure because it appeared so to be.

Fifth.—The plaintiff testified that he helped to put some of the timbers in the wall, but did not know who put in the one in question (page 4 of printed record). The proper inference is that it was done by some one of the other carpenters or masons at work on the building.

If so, the negligence, if any, was that of a fellow servant with the plaintiff of the same master, both engaged at the time in the same common object, and was one of the risks incurred by the plaintiff when he entered the employment. For such negligence the defendant is not liable.

Randall vs. B. & O. R. R. Co. (*U. S. Sup. Ct., Oct. term*, 1883.)

Sixth.—*The plaintiff was guilty of negligence, which di-*

rectly contributed to produce the injury, and without which the accident would not have happened; and for that reason was not entitled to recover against the defendant.

As we have already shown, plaintiff was not directed by the foreman to step outside of the wall; nor was there any necessity that he should do so to perform the work assigned him.

That the act of the plaintiff was not only without direction by the defendant, and without any necessity for so doing, but was reckless and venturesome, is sufficiently shown by his own testimony and that of his witnesses and notably by the testimony of the witness Russell, on page 12 of the printed record.

By the exercise of only ordinary care the plaintiff could have avoided the injury.

The doctrine that the negligence of an adult, directly contributing to his injury, and without which the misfortune would not have happened, will prevent any recovery has always been recognized and followed by this Court.

R. R. Co. vs. Gladmon, 15 *Wall* 401.
R. R. Co. vs. Stout, 17 *Wall* 657.
R. R. Co. vs. Jones, 95 *U. S.* 439.

There was no conflict in the evidence of the plaintiff and his witnesses, and the facts to which they testified are undisputed.

These undisputed facts, with all the inferences that could be justifiably drawn from them, failed to show any negligence on the part of the defendant.

They did, however, show negligence on the part of the plaintiff that directly contributed to produce the injury, and without which the misfortune would not have happened.

There was nothing to be left to the jury, and the trial Judge should have sustained the demurrer to evidence.

Improvement Co. vs. Munson, 14 *Wall* 442.

Pleasants vs. Fant, 22 *Wall* 116.

R. R. Co. vs. Jones, 95 *U. S.* 439.

Bowditch vs. Boston, 101 *U. S.* 16.

Randall vs. B. & O. R. R. Co. (*U. S. Supreme Ct., Oct. term*, 1883.)

The statute of Kansas, which prescribes the practice of filing a demurrer to evidence at the close of plaintiff's case in trials by jury, is as follows:

"Third—The party on whom rests the burden of the " issues must first produce his evidence; after he has closed " his evidence, the adverse party may interpose and file a " demurrer thereto, upon the ground that no cause of action " or defense is proved. If the Court shall sustain the demurrer, such judgment shall be rendered for the party demurring *as the state of the pleadings, or the proof, shall* " *demand.*"

Laws of Kansas, 1872, *Chap.* 162, *p.* 329.

II.

The demurrer to evidence should have been sustained and judgment rendered for the defendant in consequence of the state of the pleadings.

Thus far our argument has been made upon the basis that the proof was such that the trial Judge should have sustained the demurrer.

The Court will observe in the Statute above quoted, that a demurrer to evidence may be sustained and "*such judgment rendered for the party demurring as the state of the pleadings or the proof shall demand*"

It is the well settled rule of this Court, as well as of the Courts of most of the States, that the defendant must prove the facts showing contributory negligence of the plaintiff, and that the burden of proof on that point does not rest with the plaintiff.

R. R. Co. vs. Gladmon 15 *Wall* 401.

This rule necessitates a pleading by the defendant alleging the plaintiff's negligence. The defendant in his answer to the plaintiff's petition first denied all of its allegations; and then pleaded a second defence as follows:

"2—For second answer and defence to said petition, "said S. B. Armour says that plaintiff's injuries and "damage resulted and were caused solely by reason of plain- "tiff's own negligence and want of care; wherefore defen- "dant prays judgment."

To this answer no reply was filed.

The Statute of Kansas provides as follows;

"Every material allegation of the petition not controver- "ted by the answer, *and every material allegation of new "matter in the answer not controverted by the reply, shall "for the purposes of the action be taken as true.*"

General Statutes of Kansas 1868, p. 653 sec. 128.

When the demurrer to evidence was filed "the state of the pleadings was such," that it was admitted by them that the injuries of the plaintiff were caused solely by his own negligence and want of care.

This alone entitled the defendant tc have the demurrer to evidence sustained and a judgment rendered in his favor.

This is not the case of parties going to trial without a reply, and trial prosecuted to conclusion, without any question or objection by the party whose pleading would thereby be admitted, and the objection for the first time raised in this Court. The defendant did not waive this objection by any such action. At the proper time, at the close of the plaintiff's testimony, he filed his demurrer to evidence, and asked such judgment as the state of the pleadings and the proof warranted.

He was entitled to have his demurrer sustained and judgment rendered in his favor, not only because the proof warranted it, but for the additional reason that the pleadings admitted his right.

III.

The remaining assignments of error are; the refusal of the Court to give the third instruction asked by the defendant; and the giving by the Court of the sixth and seventh subdivisions of its charge.

Pages 14 and 16, printed record.

While not waiving the others, we deem it sufficient to call the especial attention of the Court to the sixth subdivision of the charge given by the Court below, as follows:

"Sixth—If the defendants employed a person to superintend the work on the building in question, who had the control and direction of plaintiff, then the acts and orders of said foreman, in connection with the construction of said building, are to be considered as the acts and orders of the defendants."

How misleading, obscure, and even absurd if literally construed, this instruction is, will be at once perceived by an examination of the testimony.

The plaintiff, on page five of the printed record, testified that he *was engaged by Mr. Alcutt, who was the superintendent*, and, on page four, that *Fitzgerald was the foreman* who had charge of plaintiff and twelve or fourteen others. And on page eleven, the witness Russell testified that Fitzgerald was the foreman in charge of thirteen or fourteen carpenters, and was not the foreman of the other men, masons and other laborers, who were at work upon the building. That is, that Mr. Allcutt was the superintendent of the whole, and Mr. Fitzgerald was simply a foreman of thirteen or fourteen carpenters.

Now this sixth instruction tells the jury in effect, that if Plankinton and Armours employed Mr. Allcutt as a superintendent, then the acts and orders of Mr. Fitzgerald, the foreman, in connection with the construction of the building were to be considered as the acts and orders of Plankinton and Armours.

Even if this Court shall hold that when carpenters, masons and common laborers were engaged in common work with a general superintendent over all, the acts and orders of a mere foreman of the carpenters, who had no power of even hiring and discharging, are to be deemed the acts and orders of the principal, yet this instruction is wrong.

It makes the liability of the defendant for the acts of Fitzgerald depend upon the question, whether or not there was a general superintendent. We do not claim that the Court intended any such seeming absurdity.

But we do claim that when a verdict for $7,500 is rendered against a defendant in such a case as this, we have a right to demand a reversal unless the Court has instructed the jury as the law is, and in language which cannot be misconstrued.

The constitutional right of trial by jury is subject to much injustice and abuse, which the law is unable to guard against or check. Those safeguards which the law does provide in its rules of pleading, and in the conduct of trials, should always be observed. A failure to observe them is almost always attended with injustice to one or other of the parties litigant.

And, of these safeguards, no one is more important or more conducive to a proper administration of justice, than the rule that the trial Court shall not submit undisputed facts to a jury, but shall itself say whether the undisputed facts, with all the inferences properly deducible from them, in law constitute a cause of action or defence, and render judgment accordingly.

And, of all the varied actions that come before a Court and jury for trial, none more imperatively demand the observance of these rules to prevent injustice than those brought to recover damages for personal injuries.

The result of the case at bar, where the jury rendered a verdict in favor of the injured plaintiff for seven thousand five hundred dollars, upon such a state of facts as appeared in this case, is but an illustration of the injustice liable to be inflicted upon innocent parties through non-observance by trial Courts of the forms and requirements of law.

We respectfully ask that this judgment be reversed.

WALLACE PRATT,
Attorney for Plaintiff in Error.

111-312

Office Supreme Court U.S.
FILED
MAR 20 1894
JAMES H. McKENNEY, Clerk.

UNITED STATES SUPREME COURT.

SIMEON B ARMOUR,
PLAINTIFF IN ERROR,

VS. NO. 296.

CHARLES F. HAHN,
DEFENDANT IN ERROR.

ERROR FROM CIRCUIT COURT FOR THE DISTRICT
OF KANSAS.

BRIEF FOR DRFENDANT IN ERROR.

BYRON SHERRY AND
THOS. P. FENLON,
Attorneys for ~~Plaintiff.~~ Deft in Er

UNITED STATES SUPREME COURT.

SIMEON B ARMOUR,
Plaintiff in Error,

vs. No. 296.

CHARLES F. HAHN,
Defendant in Error.

Error From CIRCUIT COURT for the DISTRICT
of KANSAS.

BRIEF FOR DRFENDANT IN ERROR.

The errors complained of are:

First—The overruling by the Circuit Court of the demurrer to evidence filed by the defendant at the close of plaintiff's testimony.

Second—The refusal of the Circuit Court to give to the jury the third special instruction asked by the defendant.

Third—The giving to the jury by the Circuit Court of that portion of its written charge, contained in the sixth subdivision thereof.

Fourth—The giving to the jury by the Circuit Court of that portion of its written charge, contained in the seventh subdivision thereof.

We will notice the several alledged errors in their order.

I.

As to overruling the demurrer to the evidence.

This was an action brought to recover damages for injuries received on account of negligence. The plaintiff alledges in his petition that he was employed by the firm of Plankinton & Armour, to work as a carpenter upon a certain building or structure, and that while so engaged he received serious injury, which resulted from the negligence of his emplyers in not furnishing him with a suitable and safe place to work. The evidence shows that he was at work on a brick building, at an elevation of thirty-four feet, and that he was ordered to assist a fellow-workman to place a joist out upon the ends of certain projecting timbers. That in obeying the order plaintiff took hold of one end of the joist, and, as the order was to push it out to the outer end of the projecting timbers, he placed one foot upon one of the projecting timbers, which, to all appearances, being imbedded in a brick wall, was safe and secure. That immediately after placing his foot upon the timber, and while in a stooping position, in the act of pushing the joist to its proper place, the projecting timber gave way and precipitated him from the top of the wall thirty-four feet to the platform below. As already stated, to all appearances, and for all the plaintiff knew, the projecting timber was safe and secure. It was imbedded and extended back into the wall for some distance, and the plaintiff had every reason to suppose that it had been securely fastened in the wall.

The plaintiff, in his direct examination, on page 3 of printed record, says:

"A.—I was working on the top of the roof, putting sheet-"ing boards on one end of it (that is one end of the "building) till along in the evening; then I got through there, "and went to the other end; when I got to the other end the "foreman was there, and he told me and another man to take a "joist and put it out on a projecting timber in the proper place.

And on page 4, when asked as to the other projecting timbers, and in answer to the question "Were these other sticks "all fastened?"

"A.—Yes sir; I know; I helped to put them in and they "were spiked in; and this was put in, and I did not know any-"thing about it. There were two courses of brick on the out-"side of this stick of timber, and two inside; and as soon as I "placed my foot on the outside of this stick of timber it tipped "and I went down." And in answer to another question on the same page he says: "That it appeared to be secure."

Then on page 8, the witness Tann, in answer to the question "State how it might have been secured?" (referring to the model), says: "It might have been secured by letting that come "the proper distance in here."

And on page 9: Q.—"If it had extended back to here "it would have been perfectly secure?" A.—"Yes, sir."

Then again on same page, in answer to the question "Is "there any other way in which it might have been secured?" says: "Yes, sir; by anchoring it."

On page 13, plaintiff, upon being recalled, testified as follows:

Q.—"What part of this building did you go from when "ordered to do this work?"

A.—"From the back part here. I was working in the "afternoon, finishing the roof."

Q.—"Did you know the condition of the thing at the time?"

A.—"No, sir."

Q.—"Did you see the men working at it?"

A.—"No; I did not know anything of it."

It is a well settled principle of law that the master is bound to furnish a safe and suitable structure for his employee, and the evidence to our mind points conclusively to the fact that the plaintiff did not know of the defect, but that defendant did or *ought* to have known of it.

The defendant takes the position that because the plaintiff placed one foot outside of the wall, upon the projecting timber which he had every reason to believe had been made secure, that he ought not to recover. The plaintiff, in doing the work he was ordered to do, simply exercised his judgment as to the manner of doing it, and when he was commanded by the foreman to "shove it out; shove it out," he did just what any ordinary prudent man would have done under the circumstances. He placed one foot out in front of him on the projecting timber, for the evident purpose of giving himself a longer reach, so as to place the joist as directed by the foreman. If the timber had been fastened by running back in the wall, or anchored as the witnesses say it ought to have been, the plaintiff would not have been injured. Or, if it had been made secure, as the plaintiff had reason to suppose it was, and he had received his injuries through inadvertance on his part, then, of course, he would not have beeen entitled to a verdict in his favor.

There can be no doubt but that the petition states a cause of action, and certainly, it cannot be seriously contended that there was no evidence to sustain the allegations of the petition.

A demurrer to the evidence, as provided for under the Kansas statute, is similar to an instruction, and this court has frequenty laid down the proposition that an instruction, to the effect that there is no evidence on which the plaintiff is entitled to recover, ought not to be given, if by any possible construction of the evidence it will support the action.

Bank v. Triplett, 1 Pet., 25.

Parks v. Ross, 11 How, 362.

Hunter v. Minor, 18 How, 286.

Spring v. Edgar. 99 U. S., 645.

Pence v. Langdon, 99 U. S., 578.

Monler v. Ins. Co., 101 U. S., 708.

And in this connection we can do no better than quote from the language of Mr. Justice Hunt, in Railroad Co. v. Stout, 17 Wall, 663. After stating cases on either side, in which it is proper to declare what is or is not negligence, he says: "But "these are extreme cases. The range between them is almost "infinite in variety and extent. It is in relation to the intermediate "ate cases that the opposite rule prevails. Upon the facts proven "en in such cases, it is a matter of judgment and discretion, of "sound inference, what is the deduction from the undisputed "facts. Certain facts we may suppose to be clearly established, "from which one sensible, impartial man would infer that proper "er care had not been used, and that negligence existed; another "er man, equally sensible and equally impartial, would infer that "proper care had been used, and that there was no negligence. "It is this class of cases, and those akin to it, that the law commits "mits to a jury. Twelve men of the average of the community, "ty, comprising men of education and men of little education, "men of learning and men whose learning consists only in "what they have themselves seen and heard—the merchant, the "mechanic, the farmer, the laborer—these sit together, consult, "apply their separate experience of the affairs of life to the facts "proven, and draw a unanimous conclusion. This average "judgment, thus given, it is the great effort of the law to obtain. "It is assumed that twelve men know more of the common "affairs of life than does one man—that they can draw wiser and "safer conclusions from admitted facts, thus occurring, than "can a single judge."

The defendant also raises a question of pleading, and makes the point that the demurrer to the evidence should have been sustained, for the reason that plaintiff filed no reply to answer, and, in support of this position, cites the familiar provision of code practice, as follows:

"Every material allegation of the petition, not controverted by the answer, and every material allegation of new "matter, not controverted by the reply, shall for the purposes "of the action be taken as true."

Now, what was the state of the pleadings? The plaintiff sets forth, in substance, that *without any fault or negligence on his part he was injured,* and that it was by reason, and through the gross negligence, inattention and want of care on the part of defendant.

The defendant then answers by setting up: first, a general denial; and for a second ground of defense alledges that the injuries occurred to plaintiff by reason of his own negligence and want of care. The second ground of defense is but a repetition of the first. It sets up "no new matter," but simply controverts what is alledged in the petition.

Allegations in an answer that raise only the question of the truth of the allegations set forth in the petition, do not require a reply.

Fergurson v. Tuts, 8 Ks., 370.

But a sufficient answer to any objection raised here, in regard to a reply, is that no such question was raised in the court below.

Bk. v. Meagher, 104 U. S., 279.

Wilson v. McNamee, 102 U. S., 572.

II.

The refusal of the Court to give the third instruction asked by the defendant; and the giving by the Court of the sixth and seventh subdivision of its charge. Pages 14 and 16, printed record.

The third instruction asked for on the part of defendant was properly refused by the Court, for the reason that it was not applicable to the issues involved in the case.

The propositions involved in this case are fully discussed and commented upon by Justice Harlan in the case of Hough v. Texas Pacific R. R. Co., 100 U. S. 213. The Court in that case recognizes the general rule exempting the common master from liability to one servant for injuries caused by the negligence of a fellow servant, but declares that to that rule there are numerous exceptions, one of which arises from the obligation of the master, whether a natural person or corporation, not to expose the servant when conducting the master's business, to perils or hazzards against which he may be guarded by proper diligence on the part of the master.

In considering what dangers the servant is presumed to risk, the Court, in Union Pacific Railroad Co. v. Fort, 17 Wall, 557, said: "But this presumption can not arise where "the risk is not within the contract of service, and the servant "has no reason to believe he would have to encounter it. If it "were otherwise, principals would be released from all obliga-"tions to make reparations to an employee, in a subordinate "position, for any injury caused by the wrongful conduct of the "persons placed over him, whether they were fellow servants in "the same common service or not."

This case was tried, in the court below, upon the theory that the defendant had not provided the plaintiff with a safe and suitable place upon which to do his work; and the proposition, that a master when employing a servant is bound to provide him with a safe working place and machinery, we think will not be doubted.

Coombs v. New Bedford Card Co., 102 Mass., 572.

Cayzer v. Taylor, 10 Gray, 274.

Seaver v. Boston & Main R. R. Co., 14 Gray, 466.

Snow v. H. R. R. Co., 8 Allen, 441.

Gilman v. E. R. Co., 10 Allen, 233.

III.

As to the sixth subdivision of the charge given by the Court as follows:

"If the defendant employed a person to superintend the "work on the building in question, who had the control and "direction of the plaintiff, then the acts and orders of said fore- "man, in connection with the construction of said building, "are to be considered as the acts and orders of the defendants"

Even admitting, for the sake of argument, that the foreman, Fitzgerald, was a fellow servant, the rule is well settled that if the negligence of the master combines with the negligence of a fellow servant, and the two contribute to the injury, the servant injured may recover damages of the master.

Crutchfield v. Richmond etc R. Co., 76 N. C., 320.

Booth v. Boston etc R. Co., 73 N. Y., 38.

Paulmier v. Erie R. Co., 34 N. J.. L., 151.

Cayzer v. Taylor, 10 Gray, 274.

Boyce v. Fitzpatrick, 80 Ind., 526.

Also the case of Grand Trunk R'y Co. of Canada v. Cummings, by this Court, in 106 U. S., 700, is a strong case upon this point.

The counsel, in commenting upon that portion of the charge above referred to, says that the language of the distinguished jurist, (Judge McCrary), is "misleading," "obscure," "and even absurd," and endeavors to make a point on the use of the words, "*foreman*" and "*superintendent.*" We are inclined to think however, that the obscurity, if any exists, is in the mind of the counsel, and not in the language of the Court, and that it arises out of counsel's misapprehension as to the meaning of the words "*foreman*" and "*superintendent.*" It is evident that the Court used the words synonymously, which according to the definition of the word "foreman," as given by Webster, was correct. The definition of the word "foreman" is: "The chief of a set of hands employed in a shop, or "works of any kind, who superintends the rest; an overseer."

It is true that Mr. Alcutt, one of the members of the firm of Plankinton & Armour, is spoken of by the witness, Hahn, as superintendent of the packing house; but the idea clearly conveyed by the charge of the Court is that if the defendant placed plaintiff in charge of a foreman, who had control and direction of plaintiff, then the acts and orders of the foreman were the acts and orders of his principal Fitzgerald was the foreman in charge of the carpenter work, and is the person referred to by the Court as foreman, or superintendent, and not Mr. Alcutt, who had nothing to do about the construction of the building We have devoted more time than was necessary in discussing the facts in this case, for all that needs to be established is that there was some testimony tending to prove the allegations of the petition; and if there was, this Court will not re-examine questions of fact upon a writ of error.

103 U. S., 313.

9 Wall, 40.

14 Wall, 490.

16 Wall, 250.

12 Wall, 297.

In the concluding portion of defendant's brief, complaint is made that injustice has been done, owing to the largeness of the verdict. While we are aware that this Court will not consider the question of the amount, we cannot refrain from calling the attention of the Court to the testimony of the plaintiff, as to the nature and effect of his injuries.

On pages 5 and 6, of record, he testifies as follows:

Q.—"Now state to the jury, as nearly as you can, what "pain you endured during that time, in consequence of this in- "jury?"

A.—"The pain was in my back, and in my bowels, and "through my limbs. After I was taken to the office and laid down, my feet and legs were numb and dumb, and I asked some "one to untie my shoe, for I thought that would relive me, but "it did not, and I have not been relieved to this day. After I "got so I could go on crutches, I had it in my back, and have "it now. I have been taking medicine from that time to now, "to move my bowels, and have to yet."

Q.—"How did it effect your urinary powers?"

A.—"It was about two days before I could make any "water, and then it was drawn from me."

Q.—"How are you in that regard now?"

A.—"Well, I can make water, but it is not right; it comes "slow, by drops, and stops suddenly and then starts again; it "takes twice as long as before."

Q.—"State to the jury the condition of your back at the "present time?"

A.—"I have a pain at the end of my back bone that never "leaves me, day or night. I cannot walk of any account; if I "go a half a mile I get a cramp in my limbs, and break down. "I cannot work. What little I have done about the house I "have to have done by a hired man."

He also says, on page 6, that his age was 46, and that before the injury he had always been a healthy man.

The physician in his testimony on pages 12 and 13 of record, says that in his opinion, the plaintiff's injuries are permanent, and that he will not recover from the injury to the spine and bladder.

The testimony shows that the plaintiff, a carpenter by trade, in the full prime and vigor of manhood, has been reduced to a physical wreck, in consequence of the negligence complained of. Yet the defendant complains that a verdict for $7,500 is too much.

As bearing upon this case, we call the attention of the Court to the following propositions of law:

It is the duty of an employer, inviting employees to use his structure and machinery, to use proper care and diligence to make such structure and machinery fit for use.

62 Me, 420

Toledo R. Co. v. Moore, 77 Ill. 110

The rule of law which exempts the master from responsibility to the servant for injuries received, from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the employer from the exercise of ordinary care, in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risk of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents, who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating. They are charged with the master's duty to the servant.

Ford v. Fitchburg R. R. Co, 110 Mass, 240

We submit, on the above authorities and facts in the case, that the charge of the Court, as found on pages 14, 15, 16 and 17 of the record, contains a full, clear and comprehensive statement of the law as applicable to this case.

Damages for Frivolous Writ.

The defendants introduced no evidence--had no excuse to offer for their negligence which caused such terrible and permanent injuries to the plaintiff, and we are satisfied that this being the case, and the charge of the Court below being such a clear and unquestioned exposition of the law, that there was no reasonable ground for presenting this case to this Court for review, and that, therefore, this is a proper case and time to inflict the penalties of Rule No. 23, second subdivision Desty's Federal Procedure, page 262.

"*Damages on Frivolous Appeal.*

"In all cases where a writ of error shall delay the proceed- " ings on the judgment of the inferior Court, and it shall appear " to have been sued out merely for delay, damages at the rate of " ten per cent. in addition to the interest shall be awarded upon " the amount of the judgment."

This judgment was rendered in June, 1881, and execution was stayed by supersedias bond, and the plaintiff has thus been kept out of his just claim for nearly three years by these proceedings, and we hold it was "merely for delay," in the language of the rule, for we submit it is not conceivable that the learned Counsel could have *imagined* it possible to reverse this judgment. If such cases as this are discountenanced by a rigorous application of the rule made to apply to them, the litigants in the Federal Courts and the bar of the country will have occasion to congratulate themselves that an opportunity is offered them in the Federal practice to enjoy in their own lifetime the fruits of their judgments, and not be compelled to leave them for the delectation of heirs and administrators. We